

NO. 33045

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

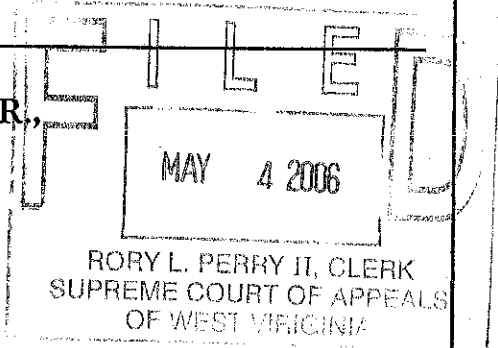
JAMES ROBERT EVANS, JR.,

Petitioner-Appellant,

v.

SHARON ROSE EVANS,

Respondent-Appellee.



BRIEF OF APPELLEE

Appeal from a Judgment of the Circuit Court of
Logan County, West Virginia

Rose Esposito Rupe
WV State Bar ID No. 3891
ESPOSITO & ESPOSITO
Attorneys and Counselors at Law
325 Stratton Street
Post Office Box 1680
Logan, West Virginia 25601
Telephone: (304) 752-7300

Counsel for Respondent-Appellee

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES.....	ii
KIND OF PROCEEDING AND NATURE OF RULING BELOW.....	1
STATEMENT OF FACTS OF THE CASE.....	4
CORRECTNESS OF ORDER OF THE CIRCUIT COURT OF LOGAN COUNTY, WEST VIRGINIA.....	7
ARGUMENT.....	7
<p>THE CIRCUIT COURT OF LOGAN COUNTY, WEST VIRGINIA DID NOT ERR IN REVERSING THE FAMILY COURT'S ORDER TERMINATING THE HUSBAND'S SPOUSAL SUPPORT OBLIGATION WHEN A COMPLETE REVIEW OF THE ENTIRE RECORD CLEARLY REFLECTS THAT THIS WAS A BARGAINED FOR AGREEMENT AND THAT THE TESTIMONY OF THE PARTIES SET FORTH THE FULL AGREEMENT WITH REGARDS TO ALL ASSETS AND ALL LIABILITIES AS WELL AS SPOUSAL SUPPORT. THE APPELLANT TESTIFIED UNDER OATH, THAT HE WOULD PAY THE APPELLEE THE SUM OF EIGHTEEN HUNDRED DOLLARS (\$1,800.00) A MONTH PERMANENT ALIMONY.</p>	
A. W.Va Code § 48-5-701.....	12
B. W.Va Code § 48-6-202.....	12
C. W.Va Code § 48-6-201.....	10, 13
D. W.Va Code § 48-6-201(b).....	14
E. W.Va Code § 48-6-203.....	9, 11, 12
CONCLUSION AND PRAYER FOR RELIEF.....	15
CERTIFICATE OF SERVICE.....	16

TABLE OF AUTHORITIES

CASES

<i>Adkins v. Adkins</i> , 208 W.Va. 364, 540 E.E. 2d 581.....	13
<i>Zirkle v. Zirkle</i> , 172 W.Va 211, 217, 304 S.E. 2d 664, 671 (1983).....	13
<i>Goff v. Goff</i> , 177 W.Va. 742, 356 S.E. 2d 496 (1987).....	13
<i>Hiatt v. Department of Labor and Industries</i> , 48 Wash.2d 843, 297 P. 2d 244, 246.....	9
<i>Mullins v. Mullins</i> , 179 W.Va 214, 366 S.E.2d 662 (1988).....	14
<i>Wood v. Wood</i> , 190 W.VA.445,438 S.E. 2d 788 (1993).....	14
<i>Magaha v. Magaha</i> , 196 W. Va. 187, 469 S.E. 2d 123 (1996).....	14
<i>Clay v. Clay</i> , 182 W.Va. 414, 388 S.E.2d 288 (1989).....	14
<i>Louk v. Louk</i> , 184 W. Va 164, 399 S.E, 2d 875 (1990).....	14

STATUTES

W.Va Code § 48-5-701.....	12
W.Va Code § 48-6-202.....	12
W.Va Code § 48-6-201.....	10, 13
W.Va Code § 48-6-201(b).....	14
W.Va Code § 48-6-203.....	9, 11, 12

KIND OF PROCEEDING AND NATURE OF RULING BELOW

This action actually began on March 27, 1970, when the Appellant and the Appellee were duly and legally married to each other in Lebanon, Virginia. The parties lived together as husband and wife until such time as they separated on or about October 14, 2001, in Logan County, West Virginia. The parties were subsequently divorced by Order entered in the Family Court of Logan County, West Virginia, on the 7th day of January, 2003, which Final Divorce Order resulted from a hearing which was held on November 21, 2002. While the parties lived together, the parties, as shown by a review of the entire record in this matter, accumulated numerous assets. This was a marriage in excess of thirty-one (31) years.

After the parties separated on or about October 14, 2001, your Appellant, James Robert Evans, Jr., retained the services of Logan Attorney, Dewayne Adkins, and filed a divorce action in the Circuit Court of Logan County, West Virginia on or about November 2, 2001. Subsequent to the filing and the service of the divorce action, your Appellee obtained Counsel and filed an Answer and a Counterclaim. After numerous hearings and numerous meetings an Order was entered by the Family Court of Logan County, West Virginia, wherein Mr. Evans was Ordered to pay for the appraisals of his business and various homes that were marital assets of this relationship. Mr. Evans never complied with the Order and subsequently his attorney sought and received an Order wherein he was allowed to be relieved as Counsel in this matter. During this entire time, Mr. Evans

thwarted the process of having his business as well as the residences appraised.

Mr. Evans then appeared pro se at a hearing November 21, 2002, wherein, and it is not disputed by any party, Mr. Evans was very eager to settle this matter. The Appellant on pages seven (7) and eight (8) of the transcript of the final divorce hearing clearly testified that he agreed to pay the Appellee Eighteen Hundred Dollars (\$1,800.00) a month permanent alimony. The transcript reads as follows:

Q. Is it also true that beginning with the month of January 1st of 2003 to let us get the paperwork done, beginning with January 1, 2003 you will pay her the sum of eighteen hundred dollars (\$1800.00) alimony, permanent alimony to her. Is that correct?

A. Yes.

A review of the entire file will show that this is not just a question of spousal support but this was a question as to the value of a substantial business as well as the value of various residences. This was not a small estate. The parties accumulated numerous assets during the course of their marriage. Mr. Evans owned a business and for whatever reason, Mr. Evans would not allow the business to be appraised. Exhibit 4 of the hearing held before the Honorable Eric H. O'Briant, Judge for the Circuit Court of Logan County, West Virginia, on the question as to whether or not a stay should be granted, showed that during a seven (7) day period, Mr. Evans paid himself the sum of Thirteen Hundred Dollars (\$1,300.00).

The Order entered by the Honorable Eric H. O'Briant, Judge for the Circuit Court of Logan County, West Virginia, wherein a Petition for Appeal was granted, clearly stated that the Circuit Court delayed rendering a decision until such time as the Court could review the Petition, the complete record of the proceedings held in the Family Court, including both audio and video recordings of the previous hearings and the Court considered the pertinent legal authority.

Mr. Evans appeared at the divorce hearing and wanted to settle this particular matter and Mr. Evans received the most valuable asset, being Evans Sales. In return, Mr. Evans agreed to the amount of spousal support as stated in the final hearing and the Final Divorce Decree. This was a bargained for agreement wherein Mr. Evans received valuable assets and Mrs. Evans received an amount of money as spousal support which Mr. Evans is now attempting to modify. A review of the entire record shows a bargained for agreement which was stated upon the record and to which both parties stated was fair, just and reasonable.

After Mr. Evans received all the valuable assets, after Mr. Evans testified that it was his agreement to pay Mrs. Evans, the Appellee, Eighteen Hundred dollars (\$1,800.00) per month permanent alimony, and upon the remarriage of Mrs. Evans, he filed the Petition for Modification which was granted by the Family Court of Logan County, West Virginia and which was overturned by the Circuit Court of Logan County, West Virginia.

STATEMENT OF THE FACTS OF THE CASE

The parties were married on March 27, 1970, separated on or about October 14, 2001, and were divorced by a Final Order of Divorce entered on the 7th day of January, 2003, which arose from a hearing of November 21, 2002. During the course of the hearing, as a review of the entire transcript will show, the parties entered into an oral separation agreement which resolved ALL issues of the marriage. Said agreement was found to be fair, just and equitable and was ratified, confirmed and approved in its entirety by the Court. Pursuant to the terms of the agreement and the Final Divorce Decree both parties received certain assets as a result of the marriage of the parties. Pursuant to the Final Order of Divorce, your Appellant received the following:

1. The Appellant, James Robert Evans, Jr. received possession, title and control of the Evans Sales business and was responsible for the payment of the indebtedness owed thereon holding the Appellee harmless. The Appellee was further ordered to execute the necessary documents to convey any and all right, title and interest that she may have in the said business to the sole name of the Appellant, James Robert Evans, Jr. As stated above, your Appellant thwarted the whole process of appraisal which kept everyone from receiving any and all knowledge about the entire business including, but not limited to the accounts as well as any possible misconduct in the business.
2. Your Appellant received possession, title and control to the residence

located in Huntington, West Virginia and was ordered to be responsible for the indebtedness owed thereon holding the Appellee harmless. Your Appellee was further ordered to execute the necessary documents to convey any and all right, title and interest that she may have in the said residence of the parties to the sole name of your Appellant.

3. Your Appellant received possession, control and title to the vehicle in his possession and was further ordered to be responsible for the payment of the indebtedness owed thereon holding the Appellee harmless. Your Appellee was further ordered to execute the necessary documents to convey any and all right, title and interest that she may have in said automobile to the sole name of the Appellant.
4. Your Appellant received possession, control and title to any and all of his Thrift Pension and or retirement plans. Your Appellee waived her right to any and all interest that she may have in the said pension/retirement.

Pursuant to the terms of the Agreement in the Final Divorce Decree, your Appellee received the following:

1. The sum of One Thousand Eight Hundred Dollars (\$1,800.00) per month for her support and maintenance until the death of either party. The entire record is clear that Mr. Evans testified under oath that he knew this to be permanent alimony. This was the agreement of the parties.

2. Your Appellee received possession, title and control to the former marital residence and was ordered to pay for the indebtedness owed thereon and was further ordered to hold the Appellant harmless from that debt.
3. Your Appellee received possession, title and control to the furniture, fixtures and appliances which were situate in the former marital residence.
4. Your Appellee received possession, title and control to her 401k pension/retirement fund.

It is clear from the entire record that the parties agreed that this would be Eighteen Hundred Dollars (\$1,800.00) permanent alimony and that they did not intend for the wife's remarriage to serve as a basis for terminating the husband's obligation. Her remarriage, the intent of the parties was, would not affect this payment because that did not pertain to their agreement. The final order did not make any provision for the affect of the wife's remarriage on the husband's spousal support obligation as the testimony of your Appellant was that this was to be a permanent alimony award and this was an agreement which settled, adjusted and compromised all assets and liabilities of the marriage.

When your Appellee remarried, your Appellant petitioned for the termination of his permanent alimony obligation. On January 25, 2005, an Order was entered by the Family Court of Logan County, West Virginia, granting the husband's petition in terminating his permanent alimony obligation. Your Appellee then petitioned to appeal the

Family Court's decision to the Circuit Court of Logan County, West Virginia. On July 12, 2005, the Circuit Court of Logan County, West Virginia, entered an Order granting the petition for appeal and reinstating the permanent award which brings us to this Honorable Court. The Circuit Court of Logan County, West Virginia, as stated above, reviewed the entire record and entered the Order granting the petition for appeal.

CORRECTNESS OF ORDER

1. The Circuit Court of Logan County, West Virginia, did NOT err in reversing the Family Court's Order which terminated Mr. Evans' permanent alimony obligation.

The Circuit Court of Logan County, West Virginia reviewed the entire record and found correctly that this was an agreement between the parties and further found that your Appellant testified under oath that this was to be a permanent alimony award. The record clearly shows that the only worthwhile asset that Mrs. Evans received was the sum of Eighteen Hundred Dollars (\$1,800.00) per month permanent alimony.

ARGUMENT

THE CIRCUIT COURT OF LOGAN COUNTY, WEST VIRGINIA DID NOT ERR IN REVERSING THE FAMILY COURT'S ORDER TERMINATING THE HUSBAND'S SPOUSAL SUPPORT OBLIGATION WHEN A COMPLETE REVIEW OF THE ENTIRE RECORD CLEARLY SHOWS THAT THIS WAS A BARGAINED FOR AGREEMENT AND THAT THE TESTIMONY OF THE PARTIES SET FORTH

THE FULL AGREEMENT WITH REGARDS TO ALL ASSETS AND ALL LIABILITIES AS WELL AS SPOUSAL SUPPORT. THE APPELLANT TESTIFIED UNDER OATH, THAT HE WOULD PAY THE APPELLEE THE SUM OF EIGHTEEN HUNDRED DOLLARS (\$1,800.00) A MONTH PERMANENT ALIMONY.

The Honorable Eric H. O'Briant, Judge of the Circuit Court of Logan County, West Virginia, in his opinion order granting the Petition for Appeal, specifically stated that the Court had delayed in rendering a decision in this matter while awaiting the retrieval by the Circuit Clerk's office of recordings of previous Family Court hearings involving this proceeding. The Court further stated that the Court took its time and had the opportunity to review the Petition, the complete record of the proceedings held in Family Court, including both audio and video recordings of previous hearings, and considered the pertinent legal authorities. The Court went on to state that as a result of those deliberations and for the reasons set forth in his opinion order granting the Petition for Appeal, the Court deemed it unnecessary to conduct oral arguments and concluded that the Family Court abused its discretion in terminating the spousal support obligation of the Appellant and reversed the Family Court decision and reinstated the Appellee's alimony. In this particular matter, the Court, after a great amount of deliberation ruled in favor of your Appellee. As stated above, your Appellant, on pages seven (7) and eight (8) of the transcript of the final divorce hearing clearly testified that he agreed to pay the Appellee Eighteen Hundred Dollars (\$1,800.00) per month permanent alimony. The transcript reads

as follows:

Q. Is it also true that beginning with the month of January 1st of 2003 to let us get the paperwork done, beginning with January 1, 2003 you will pay her the sum of Eighteen Hundred Dollars (\$1,800.00) alimony, permanent alimony to her. Is that correct?

A. Yes.

Q. And that Eighteen Hundred Dollars (\$1,800.00) will be paid to her every month beginning with January of 2003 and continuing until her death or your death. Is that correct?

A. Yes.

Black's Law Dictionary defines permanent as follows:

"Continuing or enduring in the same state, status, place, or the like, without fundamental or marked change, not subject to fluctuation, or altercation, fixed or intended to be fixed; lasting; abiding; stable; not temporary or transient. Hiatt v. Department of Labor and Industries, 48 Wash.2d 843, 297 P. 2d 244, 246. Generally opposed in law to "temporary," but not always meaning "perpetual." As to permanent "Injunction", and "Trespass".

The Circuit Court did not as stated in Appellant's Brief render a decision that was in direct contravention to the law of the State of West Virginia and did not render a decision that was contrary to the provisions of W.Va Code Section § 48-6-203.

Counsel for Appellant refers to W.Va Code Annotated Section §48-6-203, which reads as follows:

§ 48-6-203. Agreement for spousal support beyond the remarriage of the payee.

When a separation agreement is the basis for an award of spousal support, the court, in approving the agreement, shall examine the agreement to ascertain whether it clearly provides for spousal support to continue beyond the remarriage of the payee or to

cease in such event. When spousal support is to be paid pursuant to the terms of a separation agreement which does not state whether the payment of spousal support is to continue beyond the remarriage of the payee or is to cease, or when the parties have not entered into a separation agreement and spousal support is awarded, the court shall have the discretion to determine, as a part of its order, whether such payments of spousal support are to be continued beyond the remarriage of the payee. In the event neither an agreement nor an order makes provision for the remarriage of the payee, spousal support other than rehabilitative spousal support or spousal support in gross shall cease on the remarriage of the payee. Rehabilitative spousal support does not cease upon the remarriage of the payee during the first four years of a rehabilitative period. In the event neither an agreement nor an order makes provision for the remarriage of the payee, spousal support in gross continues beyond the payee's remarriage, (2001, c. 91.)

The transcript of these proceedings cannot be any clearer, as has been stated and restated. The Appellant agreed to pay the Appellee permanent alimony, permanent means permanent. Counsel for Appellant, on page six (6) of his brief, states that neither the parties Separation Agreement nor the Final Divorce Order makes any provision for the effect of the remarriage of the wife. This is not true, the parties Separation Agreement, as placed upon the record, clearly says that the alimony was to be permanent. Counsel for the Appellant, further on page six (6) of his brief, states that West Virginia Code Section § 48-6-201(b) provides that spousal awards will always be subject to modification "unless there is some explicit well expressed, clear, plain and unambiguous provision to the contrary" contained either in a divorce order or a separation agreement. Here again, it cannot get any plainer, permanent means permanent. The Circuit Court did not erroneously choose to ignore this express language and to the contrary, reviewed all of the transcripts and found that this was to be permanent alimony and the Court's order is not in direct conflict with

the provisions of West Virginia Code Section § 48-6-203. Counsel for the Appellant, on page seven (7) of the brief states that the Circuit Court's opinion clearly reveals that the Circuit Court utterly failed to acknowledge the language of West Virginia Code Section § 48-6-203, which once again is not correct. The Court specifically in its opinion stated that under West Virginia Code Section § 48-6-203 when a Separation Agreement is the basis for the award of spousal support, "the Court in approving the agreement shall examine the agreement to ascertain whether it clearly provides for spousal support to continue beyond the remarriage of the payee or to cease in such event."

Counsel for the Appellant argues that the Circuit Court's conclusion is not permissible under the language of West Virginia Code Section § 48-6-203, which is totally incorrect, as a reading of the above stated statute states that the Court shall examine the agreement to ascertain whether it clearly provides for spousal support to continue beyond the remarriage of the payee or to cease in such event. The agreement between the parties clearly said that it was a permanent award of alimony and would cease only upon the death of either party. Counsel for the Appellant further argues that if the Circuit Court's interpretation of West Virginia Code Section § 48-6-203 is given credence, then the statutory language concerning what happens with both the Separation Agreement and the Divorce Decree fail to make any provision for the effect of the remarriage of the payee spouse is rendered superfluous. However, as stated many, many times, the agreement was clear that this was a permanent alimony award to cease only upon the death of either party.

The Separation Agreement was clear upon the record.

W.Va Code Section § 48-5-701 reads as follows:

§ 48-5-701. Revision of order concerning spousal support.

After the entry of a final divorce order, the court may revise the order concerning spousal support or the maintenance of the parties and enter a new order concerning the same, as the circumstances of the parties may require. (2001, c. 91.)

As the Court stated in citing the above statute the final order of divorce was essentially a mechanism for memorializing the parties separation agreement. In the agreement reached and ratified on the record by the parties the Appellant agreed to pay the Appellee Eighteen Hundred Dollars (\$1,800.00) in permanent alimony until the death of either party. The Court went on to state that under W.Va Code § 48-6--203, when a separation agreement is the basis for the award of spousal support, "the court, in approving the agreement, shall examine the agreement to ascertain whether it clearly provides for spousal support to continue beyond the remarriage of the payee or to cease in such event." W.Va Code § 48-6-202 similarly requires the court to ascertain if spousal support is to continue beyond the death of either party. Under these code sections, if the agreement does not state that the spousal support shall cease either on the death of either party or the remarriage of the payee, "the court shall have the discretion to determine, as part of its order, whether such payments of spousal support are to continue."

The Court properly deduced from its review of the record that the parties reached a definite, certain and bargained for agreement. As stated by the Court, a part of that

agreement was that the Appellant agreed to pay the Appellee a certain amount of spousal support until the death of either party.

The Court in its ruling found that the West Virginia Supreme Court of Appeals has stated the primary standard to determine whether or not a trial court should modify an order setting an agreed amount of alimony is a substantial change of circumstances not contemplated by the parties at the time the agreement was made. See *Adkins v. Adkins*, 208 W.Va 364, 540 S.E. 2d 581, (2000), citing *Zirkle v. Zirkle*, 172 W.Va 211, 217, 304 S.E. 2d 664, 671 (1983). This Court has also placed the burden of showing a substantial change of circumstances on the party petitioning for modification of the alimony award. *Id*, citing Syllabus Point 3, *Goff v. Goff* 177 W.Va 742, 356 S.E. 2d 496 (1987). As stated by the Court in its opinion, in the present case the only legitimate evidence the Appellant set forth to support a change in circumstances was the remarriage of the Appellee. Therefore, since the Court determined the spousal support was to continue beyond the remarriage of the payee spouse, the Court found that the parties did contemplate that the Appellee might remarry and the intent of their agreement was that alimony would continue until one of the parties died. The Court further found that the Appellant did not meet his burden in proving that a substantial change in circumstances not contemplated by the parties had occurred since the entry of the Family Court's Final Order of Divorce.

West Virginia Code Section § 48-6-201 (b) reads as follows:

Any award of periodic payments of spousal support shall be deemed to be judicially

decreed and subject to subsequent modification unless there is some explicit, well expressed, clear, plain and unambiguous provision to the contrary set forth in the court-approved separation agreement or the order granting the divorce. Child support shall, under all circumstances, always be subject to continuing judicial modification. (2001, c. 91.)

In this particular case there was an explicit, well expressed, clear, plain and unambiguous provision to the contrary as reflected in the testimony of the parties at the final divorce hearing. Permanent means permanent. This Court has interpreted W. Va Code Section § 48-6-201(b) on numerous occasions. This Court has said that:

Modification of Alimony. -----By its terms, this section requires a circuit court to consider the financial needs of the parties, their incomes and income earning abilities, and their estates and the income produced by their estates in determining the amount of alimony to be awarded in a modification proceeding. Mullins v. Mullins, 179 W.Va 214, 366 S.E.2d 662 (1988); Wood v. Wood, 190 W.VA 445, 438 S.E. 2d 788 (1993); Magaha v. Magaha, 196 W. Va. 187, 469 S.E. 2d 123 (1996).

This Court further said that:

The sole purpose of an award of alimony is to provide for the support of a former spouse. In the absence of a substantial change in circumstances warranting modification, alimony should not be reduced as a method of punishing a former spouse. Clay v. Clay, 182 W.Va. 414, 388 S.E.2d 288 (1989).

Further, this Court has said that:

As a general rule, after alimony has been awarded, the petitioner must show that there has been a substantial change in the circumstances of the parties to justify a modification of the amount awarded. Louk v. Louk, 184 W. Va 164, 399 S.E, 2d 875 (1990).

The transcript of the final hearing speaks for itself. This was a bargained for agreement wherein your Appellee would receive permanent alimony. There were no grounds for the Family Court's order terminating the Appellant's alimony.

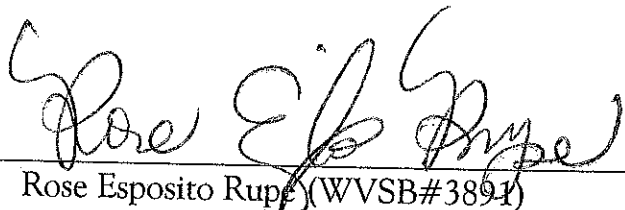
CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, your Appellee respectfully requests this Honorable Court to affirm the Opinion of the Circuit Court of Logan County, West Virginia, wherein the Circuit Court of Logan County, West Virginia, granted the Appellee's Petition for Appeal.

Respectfully Submitted,

SHARON ROSE EVANS,
Appellee/Respondent
By Counsel

BY:



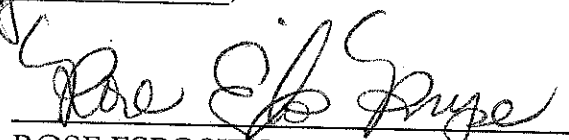
Rose Esposito Rupe (WVSB#3891)
Counsel for Appellee/Respondent
ESPOSITO & ESPOSITO
Attorneys and Counselors at Law
325 Stratton Street
Post Office Box 1680
Logan, West Virginia 25601

CERTIFICATE OF SERVICE

I, ROSE ESPOSITO RUPE, Counsel for the Appellee, Sharon Rose Evans, do hereby certify that I served a true and correct copy of the foregoing **BRIEF OF APPELLEE** by placing a true and exact copy thereof in the United States mail, postage prepaid, to M. Timothy Koontz, Counsel for the Appellant, the following address:

M. Timothy Koontz
Attorney at Law
186 East Second Avenue
Post Office Box 2180
Williamson, West Virginia 25661

on this 3rd, day of May, 2006.


ROSE ESPOSITO RUPE
Counsel for Appellee